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Supreme Court, U.S.
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No. 06-513

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner.

v.

GEORGE T. FRANKLIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

As the Warden's Petition showed, the lower courts are unsure of the difference, if any, between the "prejudice" standard used in evaluating "cause" and "prejudice" to overcome a procedural default under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and the "prejudice" standard used in weighing a claim of attorney ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984). The Warden's ultimate view is that *Sykes* prejudice is different from *Strickland* prejudice, so that the Sixth Circuit erred in collapsing the two. But more important, at this stage, is that the Court should address the issue to clear up the confusion.

In response, Franklin essentially admits that this question has vexed the lower courts, thus implying that the question is certworthy in the abstract, and he instead focuses on arguing that this case is a poor vehicle to resolve the issue. For example, he says that the difference does not matter because he could show *Sykes* prejudice, had he been asked to, so that resolving the question presented will not change the outcome of his case. He also insists that the Warden waived the *Sykes* prejudice issue.

While Franklin is right to implicitly concede that the issue is a real one that divides the lower courts, he is wrong in his argument that *this* case is not worthy of review. This case warrants review both because the issue is a live one that changes the outcome in Franklin's own case, and because the split below is ripe for review and should be resolved before courts decide more cases under the wrong framework.

Franklin's own case shows what happens when the *Sykes* prejudice standard is bypassed by virtue of folding it into *Strickland* prejudice. Here, Franklin did not challenge for cause at trial the juror who, according to the Sixth Circuit, was biased against him. And Franklin did not argue on direct appeal that the juror should have been excused. The Sixth Circuit nevertheless granted habeas corpus relief in the form of a new trial, holding that the ineffectiveness of Franklin's appellate counsel established both "cause" and "prejudice" to

excuse Franklin's failure to properly present his juror-bias claim to the state courts. But, as Franklin acknowledges, the appeals court allowed the showing of *Strickland* prejudice to do double-duty and to *automatically* satisfy *Sykes* prejudice without an independent, *Sykes*-specific layer of analysis.

Franklin insists that he meets any prejudice standard, and that he does so because his underlying juror-bias claim has merit—but that is precisely the problem, as his claim should not have been reviewed on the merits. The question presented here is whether a federal court may reach the "merits" of a defaulted claim in the first place. Here, the Sixth Circuit reviewed the "merits" of Franklin's juror-bias claim after finding that his appellate counsel was constitutionally ineffective by *failing* to present the claim as a ground for ordering a new trial. At the same time, Franklin further argues that he *actually presented* his juror-bias claim to the state courts as an independent ground for relief, so that, in his view, the Sixth Circuit correctly ordered a new trial as a remedy.

All of this shows that Franklin's case was directly affected by the Sixth Circuit's choice to forgo the *Sykes* prejudice analysis, and this means that the Court should review this issue in Franklin's case. Moreover, the issue was not waived here, as the Warden has consistently argued that the juror-bias claim is procedurally defaulted and that Franklin failed to demonstrate either cause or prejudice to excuse the default. Further, as explained below, Franklin's response also demonstrates, rather than refutes, the need to resolve this issue for the sake of the many pending cases that involve the question presented.

In sum, the Petition should be granted, and this important, recurring issue should be resolved.

ARGUMENT

A. The question presented does divide the lower courts, as Franklin essentially admits.

Notably, Franklin's response never denies that the question presented divides the lower courts. To the contrary, Franklin cites and quotes the Seventh Circuit's statement that it is "an open question" whether *Strickland* prejudice "would also be sufficient to establish 'prejudice' for the purpose of *Wainwright v. Sykes* cause-and-prejudice analysis." Franklin Response Opposing Petition for Writ of Certiorari ("Franklin Opp.") at 4-5, citing *Freeman v. Lane,* 962 F.2d 1252, 1259 n.5 (7th Cir. 1992). To be sure, Franklin cites the Seventh Circuit's further belief that the question did not need resolution in *Freeman,* and Franklin urges that the same is true here. The Warden, of course, disagrees on that issue, as explained in Part B below. But what is equally important, as step one, is that Franklin's focus on the vehicle-choice question is an implicit admission that the split is a real one.

Further, Franklin does not deny that this question is a recurring one. As our Petition noted, the distinction between *Stickland* prejudice and *Sykes* prejudice is important because a "gateway claim" of ineffective counsel is the "cause" that habeas petitioners invoke most often. Thus, if the Sixth Circuit's view is correct, and *Strickland* prejudice can automatically satisfy *Sykes* prejudice as well, then the *Sykes* prejudice prong evaporates in almost all cases in which a *Sykes* inquiry arises. In our view, that cannot be right. But if this view is somehow correct, then the Court should say so.

Indeed, habeas petitioners (other than Franklin) have as much interest as the States do in resolving this question. If Franklin's view is the right one, but the issue remains unclear, then some inmate might soon be improperly held to a heightened standard for *Sykes* prejudice. The better path is for the Court to clarify the rules of the road for all parties, so the Petition should be granted.

B. The issue does affect the outcome of Franklin's case, as the proper outcome turns on the standard of prejudice he must meet to excuse the default of his juror-bias claim.

Franklin essentially contends that because his juror-bias claim is meritorious, he has established "prejudice" no matter how or for what purpose "prejudice" is defined. Franklin Opp. at 2. But Franklin's argument is circular. He reasons that the Sixth Circuit properly excused his failure to present his juror-bias claim on direct appeal because the service of a biased juror required the reversal of his conviction and therefore he "wins under any interpretation of the *Sykes* prejudice test." *Id.* In other words, according to Franklin, the Sixth Circuit correctly excused his failure to present his juror-bias claim on direct appeal because it correctly held that the juror-bias claim was meritorious. *Id.* at 2-5.

Franklin's arguments beg the question presented by the Warden's petition. See *Conner v. Anderson*, 259 F. Supp. 2d 741, 766 (S.D. Ind. 2003) (petitioner's argument "begs the question of cause and prejudice by positing the asserted merits of a defaulted claim as a sufficient reason for overcoming the consequence of that default and reaching the merits."). The question presented concerns whether a federal court may consider the "merits" of a defaulted claim in the first place. As our Petition notes, the merits of a defaulted claim might be strong enough to establish ineffective assistance of appellate counsel as "cause," but the question here is whether a stronger or additional showing of "prejudice" is necessary to establish "prejudice" to excuse default of the claim.

Sykes prejudice can and should be different from *Strickland* prejudice, despite the common term "prejudice," because the uses arise in different contexts, asking different questions, and leading to different results. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court declined to

require a defendant to show, for purposes of showing ineffective assistance of counsel, that counsel's unprofessional actions more likely than not altered the outcome in the case. In so holding, the Court recognized that an "outcome-determinative" preponderance of the evidence standard "reflects the profound importance of finality in criminal proceedings." *Id.* at 693. But the Court nevertheless found that a "lower," reasonable probability standard is more appropriate for claims of ineffective assistance of trial counsel, because counsel's alleged errors call into question the reliability of the trial. *Id.* at 694.

By contrast, in the *Sykes* inquiry, the question differs, especially where, as here, the ineffectiveness that is urged as cause involves ineffective *appellate* counsel. That is, the reliability of the *trial* has not been called into question merely because the appellate lawyer was ineffective. Not only does the *Sykes* inquiry ask a different question, but equally important, the result is a different one, as it may lead to a new *trial,* without ever truly showing that the trial was unreliable. Thus, applying a stronger, outcome-determinative test for *Sykes* prejudice—i.e., to excuse a petitioner's failure to raise on direct appeal a claim of trial error—would be consistent with *Strickland*, because, in such circumstances, the petitioner is asking the federal court to vacate a presumptively valid trial verdict based on appellate error.

Franklin's case illustrates the problem. Here, in finding that Franklin's juror-bias claim was meritorious, the Sixth Circuit relied on a juror's voir dire statements. Those statements, according to the Sixth Circuit, demonstrated that she misunderstood the presumption of innocence and that she improperly required Franklin to offer proof of his innocence. Yet the Sixth Circuit acknowledged that the juror twice responded, "albeit somewhat reluctantly," that she understood that the law did not require Franklin to prove his innocence. One of these "reluctant" responses included a direct statement, in answer to a question by Franklin's

counsel, that if Franklin chose not to take the stand, "I wouldn't hold it against him." Notably, Franklin's trial counsel did not thereafter challenge the juror for cause. And the Sixth Circuit expressly found that the juror's statements during the jury view of the scene, based upon which the defense moved for a mistrial, did *not* require her to be excused. Pet. App. A at 20a, 24a, 26a.

On these facts, the Warden can show—and more important, deserves at least a chance to show—that Franklin could not meet a higher outcome-determinative test of prejudice under *Sykes*. That is, even if the Sixth Circuit was right to find this claim strong enough to meet the less-than-outcome-determinative test of prejudice to show appellate ineffectiveness, Franklin is wrong to suggest that the juror-bias claim was strong enough to meet a prejudice standard that might be (and in our view, should be) as high as showing that the claim would have been "outcome-determinative" if it had been raised by a better lawyer.

That is, this juror's responses do not demonstrate by a preponderance of the evidence that more likely than not the juror was biased against Franklin. The juror statements here were equivocal, as are the responses in nearly all record-based cases involving juror-bias claims. As the Sixth Circuit noted, a trial court's finding of juror impartiality is a question of fact that is subject to a highly deferential standard of review, even on direct appeal. That is because ambiguous and at times contradictory responses by jurors are not unusual, in view of their varying education and experience and their unfamiliarity with the judicial process. "Jurors thus cannot be expected invariably to express themselves carefully or even consistently." *Patton v. Yount*, 467 U.S. 1025, 1039 (1984).

Thus, the issue does matter here, as if the Warden can succeed in showing that *Sykes* prejudice requires more than *Strickland* prejudice, the Warden can then show that Franklin cannot clear that higher *Sykes* hurdle—and that leads to a

real-world difference in result. That is so because if Franklin cannot show actual *Sykes* prejudice at trial, then his claim of trial error remains procedurally defaulted, leaving him at most with an ineffective-appellate-counsel claim, which should at most lead to a new appeal.

Franklin mistakenly insists that this is not so, because, he says, he actually presented his juror-bias claim to the state courts in his application to reopen as a "discrete" ground for relief. That in turn means, according to Franklin, that the Sixth Circuit correctly ordered a new trial as a remedy. Franklin Opp. at 5-7. But Franklin's logic does not hold up. The Sixth Circuit held that Franklin's juror-bias claim was defaulted because he did *not* raise it on direct appeal, and the state courts thereafter refused to review the claim in post-conviction. "Thus, we must first decide whether Franklin can show cause and prejudice to excuse his procedural default." Pet. App. A at 5a.

Finally, Franklin is also wrong in arguing that "the Warden's procedural default arguments are waived." Franklin Opp. at 7. Contrary to Franklin's claim, the question presented by the Warden is properly before the Court. The Warden has consistently maintained both that Franklin's juror-bias claim is defaulted and that Franklin cannot show "cause and prejudice" to excuse the default. For example, the Warden argued in his brief to the Sixth Circuit that Franklin must demonstrate both "cause for the default and actual prejudice before the federal courts will hear the defaulted claims." See Warden's Respondent-Appellee Brief at 23. Indeed, the Warden cited *United States v. Frady*, 456 U.S. 152 (1982), in which the Court applied the *Sykes* prejudice standard. The Warden argued that "[d]emonstrating 'prejudice' requires showing a disadvantage 'infecting' the trial with constitutional error." The Warden separately cited *Murray v. Carrier*, 477 U.S. 478 (1986), for the standard for establishing the separate "cause" requirement. See Warden's Respondent-Appellee Brief at 23.

Indeed, even the Sixth Circuit's opinion contradicts Franklin's waiver argument. The Sixth Circuit acknowledged that it needed to find both cause and prejudice under *Sykes*; but had the Warden waived either prong of *Sykes,* the Sixth Circuit would have said so and resolved the issue against the Warden on that ground, instead of looking for both cause and prejudice. See Pet. App. A at 5a ("We focus on Franklin's claim of ineffective assistance of counsel, because such a claim can serve as both cause and prejudice.").

For all these reasons, the correct resolution of Franklin's case does indeed depend on the standard of prejudice he must meet to excuse the procedural default of his juror-bias claim. Thus, this case is a good vehicle to resolving this important, recurring issue.

C. Franklin's response shows that this issue is a recurring one that is important to the States.

As our Petition notes, Ohio allows for the reopening of the direct appeal to vindicate a prisoner's right to the effective assistance of appellate counsel. Franklin's juror-bias juror claim was one of thirty-three claims of error that Franklin listed in his application to reopen his appeal. Franklin asserts that the Sixth Circuit was correct in ordering a new trial because he included his juror-bias claim in his application as a "discrete" claim apart from an alleged claim of ineffective counsel. Franklin Opp. at 5. If this reasoning is allowed, this problem will only get worse, as if Franklin's approach is adopted by other petitioners, the decision below will essentially serve to encourage habeas corpus petitioners to circumvent the normal appellate process. Like Franklin, other petitioners may treat the right to seek reopening of their direct appeals as a means to present a laundry list of "discrete" claims and later obtain "merits" review in habeas corpus. Thus, the State's interest goes beyond Franklin's case.

Further, apart from the State's concerns that run against petitioners' interests, the States and habeas petitioners share a common interest in having the rules clarified, especially on the issue of what remedy—new trial or new appeal—should result. For example, in *Mapes v. Tate*, 388 F.3d 187 (6th Cir. 2004), the petitioner argued on appeal that the district court erred by failing to vacate his conviction and order a new trial, after an earlier remand by the Sixth Circuit for an evidentiary hearing concerning the effectiveness of appellate counsel. The remedy in such circumstances is an important question that will occur repeatedly. As our Petition noted, the differing treatment of this issue among the circuits could result in similarly-situated habeas petitioners receiving substantially different relief, based solely on the circuit in which they file.

CONCLUSION

For the reasons above and in our Petition, the Petition should be granted.

Respectfully submitted,

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